

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DONALD A. WILLIAMSON, | § | |
| | § | No. 168, 2009 |
| Defendant Below, | § | |
| Appellant, | § | Court Below: Superior Court of |
| | § | the State of Delaware in and for |
| v. | § | New Castle County |
| | § | |
| STATE OF DELAWARE, | § | Cr. I.D. No. 0402011241 |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: August 12, 2009

Decided: September 16, 2009

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

ORDER

This 16th day of September 2009, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Donald A. Williamson appeals from a Superior Court judgment determining that he violated the terms of his probation arising out of his conviction for Second Degree Conspiracy. Williamson claims that the Superior Court erred by: (i) sentencing him to a greater prison term for that Violation of Probation (“VOP”) than his suspended sentence on the underlying Conspiracy conviction; and (ii) failing to credit against his VOP sentence the time that he was incarcerated. Because the Superior Court improperly sentenced Williamson on the VOP for a

term greater than the suspended sentence on the underlying conviction, as the State concedes, this case is remanded to the Superior Court for resentencing.

2. On February 19, 2004, Wilmington police arrested Williamson in connection with a robbery. Williamson was incarcerated at the Howard R. Young Correctional Institution (“YCI”) from his arrest until February 24. On March 22, Williamson was indicted on charges of Second Degree Robbery and Second Degree Conspiracy. He pled guilty to Second Degree Conspiracy (the “Conspiracy conviction”), and the State entered a *nolle prosequi* on the robbery charge. On August 17, Williamson was sentenced to two years at Level V, suspended for twelve months at Level II, with credit for eleven days he previously served.

3. Over the next five years, Williamson was convicted of violating his probation six times and his sentence was modified eight times. (Two of those modifications were unrelated to the VOP determinations). He also was convicted of four other crimes, and moved in and out of incarceration at YCI. Although Williamson appeals only from the Superior Court’s March 4, 2009 VOP sentencing order, to place his claim in context it is necessary to outline Williamson’s criminal history.

4. On December 7, 2004, Williamson was arrested for Criminal Impersonation and Possession of Cocaine, and was held at YCI for one day until he posted bail. From June 1 to June 7, 2005 Williamson was held at YCI in default of

bond on the Criminal Impersonation and Possession of Cocaine charges, until he again posted bail. On June 15, 2005, Williamson pled guilty to Possession of Cocaine (“Possession conviction”), and the State entered a *nolle prosequi* on the impersonation charge. The Superior Court sentenced Williamson to two years at Level V, suspended for eighteen months at Level III, on the Possession conviction. The Superior Court also determined that the Possession conviction was a VOP relating to the Conspiracy conviction, and sentenced Williamson to one year and eleven months at Level V, suspended for one year at Level IV.

5. On August 31, 2005, Williamson was found to have committed VOPs for both his Conspiracy and Possession convictions. The Superior Court sentenced Williamson to one year and eleven months at Level V, suspended after time served for twenty-three months at Level IV on the Conspiracy conviction. The court continued his sentence on the Possession conviction.

6. On March 1, 2006, Williamson was arrested for Second Degree Escape, and was held at YCI in default of bond on that charge. The Escape charge was the basis of a third VOP for the conspiracy charge. On March 7, Williamson was resentenced to twenty-two months at Level V, suspended for twenty-two months at Level IV. On August 7, 2006, Williamson pled guilty to Second Degree Escape (“Escape conviction”). On October 20, 2006, the Superior Court declared Williamson an habitual offender following the Escape conviction, and sentenced

him to two years at Level V, followed by six months at Level IV. After the sentence on Williamson's Escape conviction ended on December 6, 2007, he was released from YCI.

7. On August 8, 2008, Williamson was arrested for Second Degree Assault, Endangering the Welfare of a Child, First Degree Unlawful Impersonation, and Unauthorized Use of a Motor Vehicle. He was held at YCI. That arrest triggered VOPs on the Conspiracy and Possession convictions. On August 28, the Superior Court resentenced Williamson to two years at Level V, suspended after one year for six months at Level IV, with a hold at Level V until space was available at Level IV on the Conspiracy VOP, and to twenty-two months at Level V on the Possession VOP.

8. On October 16, 2008, the Superior Court modified Williamson's Conspiracy sentence to two years at Level V, suspended immediately for six months at Level IV, followed by six months at Level III.

9. On November 17, 2008, Williamson pled guilty to Second Degree Assault ("Assault conviction") and Endangering the Welfare of a Child ("Endangering conviction"), and the State entered a *nolle prosequi* on the other two charges. Williamson was sentenced to two years at Level V, suspended for one year at level III on the Assault conviction; and one year at Level V, suspended for one year at Level III on the Endangering conviction. The one hundred and four

days Williamson had spent at YCI since his Assault arrest were credited toward his Assault and Endangering convictions. Williamson was released from YCI on November 21, 2008.

10. Williamson was later arrested and held at YCI from December 15 to 16 for a VOP on the Conspiracy charge. On December 23, 2008, the Superior Court found a fifth VOP for the Conspiracy conviction. The court resentenced Williamson to two years at Level V (with credit for nine days served), suspended for sixty days at Level IV, followed by the balance of the two years at Level III.

11. On February 25, 2009, Williamson was arrested for Shoplifting, and immediately incarcerated at YCI. Finally, on March 4, 2009, the Superior Court found a sixth VOP for the Conspiracy conviction, based on Williamson's involvement in Shoplifting. The court resentenced Williamson to two years at Level V, with credit for the nine days Williamson previously served. Williamson timely appeals from that March 4 sentencing order.

12. After determining that Williamson's Shoplifting was a VOP on his Conspiracy conviction, the Superior Court resentenced Williamson to two years at Level V, with credit for the nine days previously served. The Court did not explain its reasoning.

13. Williamson raises two arguments on appeal. First, he argues that the Superior Court lacked the authority to resentence him on his 2004 Conspiracy

conviction in 2009, because the original sentence had expired, and therefore he could not have violated his probation. Second, Williamson argues that if the Superior Court had authority to resentence him on the conspiracy conviction, that court nonetheless erred by: (i) imposing a two year sentence, where his conspiracy sentence had previously been reduced to twenty two months; and (ii) not crediting him for all the time he was incarcerated at YCI.

14. The State responds that the Superior Court had the authority to resentence Williamson on his Conspiracy conviction, because once an offender violates his probation, the court has the power to resentence on the original conviction. The State concedes, however, that the Superior Court erred by ultimately resentencing Williamson to two years (twenty-four months) at Level V, where his sentence had previously been reduced to twenty-two months at Level V. The State urges this Court to remand the case to the Superior Court, with instructions to reduce Williamson's sentence to no more than twenty-two months. The State also argues that Williamson is not entitled to any credit for the time he was held at YCI (except for the nine days the Superior Court credited him) because he was being held on other charges. Williamson rejoins that the documents the State relies upon—Department of Correction "Location History"—to establish that he was being held on other charges were not part of the record below and may not be considered on appeal.

15. There are two issues. The first is whether the Superior Court had the authority to resentence Williamson in 2009 on a 2004 conviction that carried only a two year sentence. The second issue is how many days of prior incarceration should be credited towards that sentence. We conclude that the Superior Court had the legal authority to resentence Williamson, but because the record does not establish specifically when Williamson was incarcerated on each charge, we cannot determine whether Williamson received appropriate credit towards his sentence.

16. Williamson concedes that he did not argue before the Superior Court that that court lacked authority to impose a two year sentence on the Conspiracy VOP. Although his arguments are therefore subject to waiver under Supreme Court Rule 8, we find that this case falls under the “interests of justice” exception, because the State acknowledges that the Superior Court erroneously sentenced Williamson. On that basis, we review for plain error.¹

17. Williamson claims that the sentence on his 2004 Conspiracy conviction had expired when the Superior Court resentedenced him in 2009. Specifically, Williamson argues, the Superior Court lacked legal authority to indefinitely extend his probation, and that therefore his sentence expired when he was charged with

¹ See *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004) (reviewing a question not presented to the trial court for plain error); see also *Jackson v. State*, 894 A.2d 406 (Table), 2006 WL 585560 (Mar. 8, 2006, Del. Supr.) (remanding a VOP conviction for resentencing where the State conceded the defendant was entitled to greater credit against his conviction).

his sixth VOP in March 2009. Williamson relies on two cases, *Tiller v. State*² and *Stevenson v. State*.³ Neither is apposite.

18. In *Tiller*, we held that unlike the federal probation statute,⁴ 11 *Del C.* § 4334 “does not grant the authority to enlarge a period of probation once imposed.”⁵ Here, however, the Superior Court did not enlarge Williamson’s period of probation. Instead, it resentenced Williamson to his original term of incarceration (or slightly shorter sentences) on several occasions after the VOPs. “[O]nce a defendant violates the terms of his probation, the Superior Court has the authority to require a defendant to serve the sentence initially imposed, or any lesser sentence.”⁶

19. In *Stevenson*, we vacated a defendant’s VOP sentence where the sentence on the predicate conviction had expired, *i.e.*, the full term of probation had been served.⁷ *Stevenson* is distinguishable because here, Williamson’s term of probation never expired before he was charged with a VOP in 2009. Before any term of probation ended, Williamson was convicted of a VOP and resentenced to a new term of Level V incarceration (suspended for a term at a lower restriction

² 257 A.2d 385 (Del. 1969).

³ 808 A.2d 1205 (Table), 2002 WL 31399418 (Sept. 17, 2002, Del. Supr.).

⁴ See 257 A.2d at 387 n.2 (quoting 18 U.S.C. § 3651) (“The Court may revoke or modify any condition of probation, or may change the period of probation.”).

⁵ 257 A.2d at 387.

⁶ See *State v. Sloman*, 886 A.2d 1257, 1260 (Del. 2005) (citing 11 *Del. C.* § 4334(c)).

⁷ 2002 WL 31399418, at *2.

level). Those VOPs effectively “restarted the clock” on his probation and kept his sentence from expiring.

20. The State concedes that the Superior Court erred by sentencing Williamson to two years of incarceration, after his sentence had previously been reduced to twenty-two months. The State acknowledges that on remand, Williamson’s sentence should not exceed twenty-two months. The remaining issue is how much credit towards that twenty-two month sentence is proper. Williamson argues that he had served somewhere between fifteen and eighteen months of his original sentence during the various times he was incarcerated after his original conviction. The State responds that Williamson is not entitled to credit for the time he was incarcerated, for two reasons. First, during most of that time he was being held on other criminal charges. Therefore, that time may not be credited against his Conspiracy sentence. Second, the time that Williamson was actually held on the Conspiracy conviction was credited towards his sentence when the Superior Court ordered two reductions to his Conspiracy sentence (the first reduction to one year and eleven months; the second, to twenty-two months). Therefore, the State argues, Williamson is entitled to credit only for the nine days previously served.

21. Under Delaware’s consecutive sentencing law, any time Williamson spent in prison on a different conviction cannot be credited against his Conspiracy

sentence.⁸ This Court, however, cannot determine which, if any, portion of the fifteen to eighteen months that Williamson claims were served on the Conspiracy conviction was actually attributable to that conviction. Williamson would be entitled to credit for any time attributable to the Conspiracy conviction. The DOC “Location History” upon which the State relies to establish that the disputed fifteen to eighteen months were actually served for other convictions, was not part of the Superior Court record. Therefore, we cannot determine which, if any, portion of that period was attributable to the Conspiracy conviction, and what, if any, credit is due to Williamson. Whether Williamson is entitled to any credit for that disputed period is for the Superior Court to determine on remand.

22. Excluding that disputed period of time leaves four periods during which Williamson was held on the Conspiracy VOPs. Two of those periods of incarceration were followed by reductions in Williamson’s sentence, which more than accounted for those periods of incarceration.⁹ One of those periods was associated with Williamson’s fifth VOP, for which the Superior Court credited him with nine days towards his sentence. The final period was for the nine days that

⁸ See 11 *Del. C.* § 3901(d). “No sentence of confinement of any criminal defendant by any court of this State shall be made to run concurrently with any other sentence of confinement imposed on such criminal defendant.”

⁹ Williamson concedes that the first reduction in his sentence accounted for the prior time he was held on the Conspiracy conviction. Williamson argues, however, that it is “not clear” that the second reduction in his sentence adequately credited for the time he had served. After a review of the record, Williamson’s claim that it is “not clear” that that second reduction gave him adequate credit fails to establish plain error.

Williamson was held pending his sixth and final VOP. The Superior Court credited Williamson with the nine days associated with the sixth VOP, but erroneously failed to account for the nine days credit associated with the fifth VOP. Williamson is therefore entitled to a minimum of eighteen days credit towards his Conspiracy sentence, plus credit for any portion of the disputed fifteen to eighteen month period that the Superior Court finds to be attributable to the Conspiracy conviction.

NOW, THEREFORE, IT IS ORDERED that this matter is **REMANDED** to the Superior Court, to resentence Williamson to no more than twenty-two months incarceration, with a credit of eighteen days toward that sentence. The Superior Court shall determine whether Williamson is entitled to any additional credit. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice